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No. 85-916

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE LAW FIRM OF
DANIEL P. FOSTER, P.C.
PETITIONERS

v

THE UNITED STATES OF AMERICA
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE LAW FIRM OF
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QUESTION PRESENTED

Is a ruling that a District Court declines to exercise its jurisdiction to hear a F.R.Cr.P., Rule 41(e) motion an appealable order where the government has agreed to return all materials seized, the investigation of movants is closed, and they have not been arrested, charged or indicted?

TABLE OF CONTENTS

Page

Question Presented.....i

Table of Contents.....ii

Table of Cases.....iv

Opinions Below.....1

Jurisdiction.....3

Statutes Involved.....4

Statement of the Case.....5

Introduction.....12

I. The Appellate Court's Ruling that the District Court's Order is Non-Appealable is Contrary to this Court's Prior Holdings in DiBella v. United States and other pertinent cases.....18

II. The Ruling of the District Court has so far departed from the accepted and usual course of the Judicial Proceedings -- and the same was sanctioned by the Court of Appeals -- as to require an exercise of this Court's Power of Supervision.....31

III. There is a true and significant Conflict among the Circuits as to how cases such as this are to be handled.....40

Conclusion.....47

Appendix:

Order, USCA 2nd Cir. (7-19-85).....A-1

Transcript, USCA 2nd Cir. (7-19-85)....A-3

Opinion, USDC/EDNY - Bramwell, J.
(4-8-84).....A-6

Opinion, USDC/EDNY - Nickerson, J.
(7-7-85).....A-11

Order, USDC/EDNY - Bramwell, J.
(3-29-85).....A-16

Opinion, USDC/SDNY - Lasker, J.
(11-16-84).....A-17

Order, USSCt. - Marshall, J.
(9-11-85).....A-19

Statutes Involved.....A-20

TABLE OF AUTHORITIES

Abney v. United States,
431 U.S. 651 (1977) 16

Application of Campola,
543 F. Supp. 115
(N.D.N.Y. 1982) 44

Application of Herr,
473 F. Supp. 1304
(S.D.N.Y. 1979) 20, 21,
25, 28

Boyd v. United States,
116 U.S. 616 (1886) 31, 34

Burdeau v. McDowell,
265 U.S. 465 .....18, 27

Centraccio v. Garrity,
198 F.2d 283 (1st Cir.,
1952, cert. den. 344 U.S.
866 40

Cobbledick v. United States,
309 U.S. 323 (1940) 18, 29

Cohen v. Beneficial Industrial
Loan Corp., 337 U.S. 541
(1949) 16

DiBella v. United States,
369 U.S. 212 (1962) ...18, 19, 24,
25, 26, 28,
38,41, 43, 45

Douglas Oil Co. v. Petrol,
Stops Northwest, 441 U.S.
156 (1974) 38

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 38

Entick v. Carrington, 19 How. St. Tr. 1029 (1765) 17

Essgee v. United States, 262 U.S. 147 .....18, 35

Freedman v. United States, 421 F.2d 1293 (9th Cir., 1970) 39

Helstoski v. Meanor, 442 U.S. 500 (1977) 17

Hill v. United States, 346 F.2d 175 (9th Cir. 1965), cert. den., 382 U.S. 956 44

In re Fried, 161 F.2d 453 (2nd Cir., 1947), cert. den., 332 U.S. 807 25

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 13

Marron v. United States, 275 U.S. 192 (1927) 35

Nathanson v. United States, 290 U.S. 41 (1933) 35

Peiper v. United States, 604 F.2d 1131 (8th Cir., 1979) 44

Perlman v. United States, 247 U.S. 7 (1917) 18, 19, 29, 30

Radio Station WOW v. Johnson, 326 U.S. 120 38

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 18, 19

Stack v. Boyle, 243 U.S. 1 (1951) 16, 24

Standard Drywall, Inc. v. United States, 668 F.2d 156 (1982), cert. den., 456 U.S. 927 (1982) 7, 24, 43

Stanford v. Texas, 379 U.S. 476 (1964) 35

Swift & Co. Packers v. Compania Colombiana Del Caribe, S.H., 339 U.S. 684 (1950) 17, 24

United States v. Glassman, 533 F.2d 252 (5th Cir., 1976) 43

United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) 17

United States v. Imperial Distributors, 617 F.2d 892 (1st Cir., 1980) 43

United States v. Klapholz, 230 F.2d 494 (2nd Cir. 1956)..... 26

United States v. Premises Known as 608 Taylor Ave., etc. 584 F.2d 1297 (3rd Cir., 1978) 41

United States v. Ryan, 402 U.S. 530 (1970) ...18, 19, 29

United States v. United States Currency, 495 F. Supp. 147 (E.D.N.Y. 1980) 42

United States v. Reid 37

Constitutional Provisions:

U.S. Const. Amend. 4 ..... 1.

United States Statutes:

18 U.S.C. Section 3231 3

28 U.S.C. Section 1257(3) 3

28 U.S.C. Section 1291 ....3, 13, 17

28 U.S.C. Section 1331 12

Federal Rules of Criminal Procedure:

Rule 41(e) .. i, 1, 3, 6, 8, 10, 19, 22, 40, 41, 43, 45

OPINIONS BELOW

The United States District Court for the Eastern District of New York (Nickerson, J.) declined on June 7, 1985 to exercise its jurisdiction to hear and decide a motion to quash a "warrant" executed upon the FIRM and to return all property seized thereunder, brought pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, on the condition that the Government return all property seized. The District Court's order is set out in the Appendix (A-11 - A-15).

The FIRM filed its Notice of Appeal on June 10, 1985, and sought a stay pending appeal which was denied by the Court below (Sifton, J.).

On June 18, 1985, the United States Court of Appeals for the Second Circuit denied the FIRM's motion for a stay pending appeal, but granted its motion ordering that the appeal be expedited.

The United States Court of Appeals for the Second Circuit dismissed the appeal on July 19, 1985, holding the District Court's order to be non-appealable. The order and transcript of oral opinion are set out in the Appendix. (A-1 - A-5).

JURISDICTION

The District Court declined to exercise its jurisdiction over FIRM's motion brought pursuant to F. R. Cr. P. 41(e) on June 7, 1985. The FIRM filed its Notice of Appeal on June 10, 1985. Jurisdiction wss predicated on 28 U.S.C. 1291. The United States Court of Appeals for the Second Circuit dismissed the appeal on July 19, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

STATUTES INVOLVED

18 U.S.C. §3231: The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

28 U.S.C. §1331: (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. §1257(3) and 28 U.S.C. § 1291 and F.R.Cr.P., Rule 41(e) and (g) are quoted in full in the Appendix.

STATEMENT OF THE CASE

Petitioner, THE LAW FIRM OF DANIEL P. FOSTER, P.C. (hereinafter "FIRM") is a professional corporation, incorporated pursuant to the laws of the State of New York by attorneys admitted to practice and in good standing the states of New York and California, various federal district courts and circuit courts of appeals and the Bar of this Court, with its principal place of business in the Borough of Manhattan.

On February 17, 1984, the FIRM was the object of massive search and of seizure of approximately one-half million documents and items by a Joint Task Force of federal agents and New York Police officers (JTF), preannounced to the media by FBI spokesmen as a "pre-emptive strike," and accompanied by FBI agent appearances at or interrogatories of clients in more than half a dozen states. There were no arrests, no charges and no indictments upon the alleg-

ations which formed the basis for the "warrants".

The FIRM moved to quash the "warrants" as void and for return of all materials seized -- in both the Southern and Eastern Districts of New York (SDNY and EDNY) -- pursuant to Federal Rules of Criminal Procedure, Rule 41(e) on the ground that the "warrants" were void on their face, that the property seized was not that described in the "warrants," that the "warrants" were obtained by misrepresentations to the Court, and that they were illegally executed.

On March 7, 1984, the EDNY, per Bramwell, J. confirmed on the record the first misrepresentation -- that he had not been informed on the night the "warrant" was sought from him that attorneys of the FIRM had been subpoenaed for the property sought by "warrant" that day, had appeared pursuant to subpoena and the Court, Nickerson, J., had ordered the materials

produced the following afternoon at 1:45 for claims of attorney-client privilege.[1] However, based on the government's representations of "ongoing grand jury proceedings" in the EDNY, the FIRM's motion was denied pursuant to Standard Dry Wall v. United States, 668 F.2d 156 (1982), cert. den., 456 U.S. 927 (1982). The SDNY (per Lasker, J.) rendered a similar decision the following month.

There were no "ongoing grand jury proceedings," charges or prosecutions upon the allegations which gave rise to the "warrants."

These allegations were contained in the affidavit in support of the "warrants" -- an FBI agent's hearsay affidavit (hereinafter HERMAN AFFIDAVIT) which relied in

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[1] This appearance was never made -- it was precluded by the search and seizure.

large part upon an eleven year-old informant's affidavit submitted against a FIRM client in a Suffolk County criminal case which had been dismissed due to the lack of credibility and reliability of that informant in 1975. The Court was not informed of these facts. This affidavit was ordered sealed upon ex parte motion of the United States Attorney on February 22, 1985.

On November 16, 1984, the SDNY (per Lasker, J.) ruled upon Petitioner's subsequent motion for Rule 41(e) relief, making clear the illegal nature of the search and seizure. (A - 17,18) It declined to rule as to property seized in the EDNY, referring Petitioners to the EDNY as the more appropriate jurisdiction, in opinion of April 1, 1985.

Two days before, the government obtained an ex parte order from Judge Bramwell unsealing the HERMAN AFFIDAVIT. (A -16)

The FIRM, upon learning of this order ex post facto alleged jeopardy to its motion to quash the "warrants" as void on their face and moved for vacatur of the ex parte order and resealing of the HERMAN AFFIDAVIT pending noticed application of the Assistant United States Attorney to unseal. The Court (Bramwell, J.) denied the motion on April 8, 1985. (A - 6 - 10)

On May 8, 1985 the Middle District of North Carolina stayed proceedings before it, United States v. Reid, which were the fruit of the search of the FIRM -- giving rise to a charge characterized by the government as a single one-count indictment, local in nature and unrelated to the allegations upon which the "warrants" were obtained. That Court ruled that the District of seizure was the appropriate venue to rule upon the legality of the search and seizure.

The government submitted no res-

ponding papers, affidavits or evidence in opposition to Petitioner's Rule 41(e) motion.[2] The day before it was scheduled for hearing, May 30, 1985, the government proffered, by letter, return of all materials seized more than fifteen months before. On that representation the Court declined to exercise its jurisdiction to hear the FIRM's motion for Rule 41(e) relief. (A - 11-15) On the date scheduled for this hearing and since, the government has repeatedly affirmed that its "investigation" in this matter is closed.

The FIRM appealed both the decision of Judge Nickerson declining to exercise jurisdiction of the EDNY to hear and rule upon the FIRM's Rule 41(e) motion and Judge Bramwell's ex parte order unsealing the HERMAN AFFIDAVIT and decision denying

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[2] On appeal -- for the first time -- the government submitted a contravening factual statement -- unsworn. This just reaffirms Petitioners position that the matter should be heard.

vacatur of the order pending noticed hearing. The Court of Appeals for the Second Circuit, in decision of July 19, 1985, ruled the first a non-appealable order and affirmed the second. (A - 3-5)

On September 11, 1985, Mr. Justice Marshall ordered that time for filing Petition for Writ of Certiorari as to Judge Bramwell's order and decision be extended thirty days, to and including October 17, 1985. (A - 19)

The materials seized from the FIRM on February 17, 1984 to date have not been returned, despite representations of the Assistant United States Attorney and the JTF - 2 and direct orders of the EDNY and Second Circuit Court of Appeals.

INTRODUCTION

This Petition raises questions of critical important to the administration of justice in the courts of the United States. It also raises a true conflict between the various courts of appeals as to how such questions are to be decided. The result, for Petitioners, is a complete denial in this matter of notice, of opportunity to be heard, of fundamental due process and of the right to petition the government for redress of grievances under the Constitution and the Bill of Rights, most particularly the Fourth Amendment.

The matter in the District Court was not a criminal proceeding; the court would have had no jurisdiction on that ground since no criminal proceeding was ever instituted against Petitioner, or anyone else for that matter, in the Eastern District of New York. 18 U.S.C. Section 3231.

The District Court clearly had jurisdiction to hear the matter below and the questions presented therein pursuant to 28 U.S.C. Section 1331. The controversy clearly arose under the Constitution and laws of the United States. The court did not rule to the contrary, and no allegation was ever made, nor did the court of appeals hold, that jurisdiction in the District Court was lacking.

In the ordinary instance, a District Court has no discretion to refuse to determine a case within its jurisdiction, and to say what the law is, even if that means declaring a law or other exercise of governmental power illegal or unconstitutional. Marbury v. Madison, 1 Cranch 137, 2 L.Ed 60 (1803).

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide the

operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. ...

"Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

"From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

"Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

"The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as -----, according to the best of my abilitites and understanding, agreeably to the constitution, and laws of the United States.'"

"Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

"If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

> "It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.
>
> "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

Similarly, the court of appeals is bound to determine a case properly before it, and while the general rule is that there must be a final adjudication to permit an appeal, especially in a criminal context, exception is made for collateral orders especially where the right protected would be lost if the appeal is not allowed. 28 U.S.C. Section 1291; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-7 (1949); Stack v. Boyle, 342 U.S. 1 (1951); Abney v. United States, 431 U.S. 63 (1977);

Helstoski v. Meanor, 442 U.S. 500 (1977). See United States v. Hollywood Motor Car Co., 458 U.S. 263, 265-6 (1982).

Since no action was or is contemplated against Petitioner and any pending arguably criminal proceeding had been closed at the time of this motion in the District Court, the decision of the District Court effectively foreclosed hearing of the matter at any time and finally and completely determined the rights of the parties herein. The order was therefore appealable to the court of appeals. 28 U.S.C. Section 1291. All considerations contained in the cases under that section militate in favor of determination of the matter of the order as a final adjudication. See, e.g., Swift & Co. Packers v. Compania Columbiana Del Caribe, S.H., 339 U.S. 684 (1950); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

I. THE APPELLATE COURT'S RULING THAT THE DISTRICT COURT'S ORDER IS NON-APPEALABLE IS CONTRARY TO THIS COURT'S PRIOR HOLDINGS IN *DIBELLA v. UNITED STATES* AND OTHER PERTINENT CASES.

The applicable Supreme Court precedents show that orders resulting from proceedings brought for return of documents which are not brought in the course of criminal proceedings, and which are not brought for an illegitimate purpose, such as disruption or interference with Grand Jury proceedings before indictment, are appealable. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Cobbledick v. United States, 309 U.S. 323, 328-9 (1940); Burdeau v. McDowell, 265 U.S. 465 (where District Court's action itself tends to disrupt ongoing proceedings, its orders are appealable); Essgee v. United States, 262 U.S. 147; United States v. Ryan, 402 U.S. 530, 533 (1970); DiBella v. United States, 369 U.S. 121 (1962); Perlman v. United States, 247 U.S. 7 (1917).

The fact that such a motion carries constitutional basis and merit and would have the coincidental effect of rendering any material seized inadmissible in evidence in any hearing or trial, does not change this rule. Silverthorne Lumber Co. v. United States, supra.

The cases which have ruled District Court orders non-appealable where pre-indictment proceedings are concerned, recognize this rule of law, codified in Rule 41, F.R.Cr.P. See, e.g., DiBella v. United States, supra; United States v. Ryan, supra; Perlman v. United States, supra. Without appellate review of the District Court's erroneous determination to decline jurisdiction, no forum is available to redress serious constitutional violations Petitioners have suffered and continue to suffer.

The District Court below, having heard no evidence on the subject and having received no submission from the Government except its representations that: (1) all materials seized

would be voluntarily returned; (2) the Government planned no prosecution against Petitioner, and none was pending; and (3) the Government did not intend to use the materials seized for any law enforcement purpose -- ruled that jurisdiction in the matter would be declined on authority of Application of Herr, 473 F. Supp. 1304 (S.D.N.Y. 1979); United States v. Lester, 21 F.R.D. 30 (S.D.N.Y. 1957) and In re Grand Jury Proceedings, 466 F. Supp. 863 (D. Minn. 1979); [But compare, United States v. Brewer, 24 F.R.D. 12 (N.D. Ga. 1959)]; that the Court was not the Trial Court, because no action was pending against Petitioner.

This holding was spurious, as no proceeding was pending anywhere against movant. Petitioner, by the District Court's ruling, thus has no district available to grant the relief sought.

There was a proceeding pending against another party in another district regarding a matter alleged by the Government to be wholly independent of the investigation of the FIRM in New York and which certainly was not contemplated at the time of the seizure; and even that proceeding, to the extent that a single determination of the matter might have ramifications elsewhere, had been stayed pending determination in the districts of seizure. No harm could have been done in any quarter had the proceeding below gone forward.

The nisi prius Court's declination is expressly based upon speculation that "the Government might seek to introduce the property or fruits thereof", speculation which is irrelevant to the declaration of movant's rights. Application of Herr, supra at 1305. In fact, all of the considerations affecting venue militated in favor of a New York determination of the question of legality of the search and seizure. These considerations are

described at length in United States v. Lester, supra. The District Court's determination, made without evidentiary hearing even as to jurisdictional fact, was clearly erroneous, and simply operated to forclose to movant a hearing on the validity of the search.[3] The North Carolina trial having come and gone, the materials -- return of which had been promised -- are still in the hands of the JTF and Petitioner is still unable to avail itself of a hearing on the legality of the search and seizure.

The true connection between the Reid case and the within application shows conclusively that the settled decisions of this Court were not followed. The search and seizure herein was conducted in New York in

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[3] Although the District Court utilized the existence of the Reid matter in North Carolina to decline jurisdiction, it received no evidence or submission as to the subject, origin or relation of that matter to the Rule 41(e) motion -- its existence was merely raised in oral argument.

1984.

Through it, certain materials, over one-half million strong, were seized from the FIRM in the Southern and Eastern Districts of New York. The parties in the Reid matter disputed from which district the single receipt leading to the investigation of Reid was taken. The result of the District Court's declining to exercise its jurisdiction to hear this motion was that disparate results obtained depending on which district was held to be the district of seizure. The North Carolina district had sought to avoid that quandry by staying its own hand pending determination of this mation.

The Reid prosecution was clearly an afterthought -- arising some months after the search and seizure and not having been contemplated before.

The issuing magistrate, upon explanation of the full circumstances under which the "warrants" were obtained from him, was dubious as to their legality, but felt constrained not to

overrule them in the pre-indictment context. Standard Drywall, Inc. v. United States, supra. There was no showing the motion herein would have affected the Reid matter; the trial court was content to await its decision in any event to save precious judicial resources; further the outcome of the Reid matter has no effect on this motion; hence, the two proceedings were effectively independent. In such situations, appeal of denial of relief is warranted and in fact required. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546; e.g., Stack v. Boyle, 342 U.S. 1; Swift v. Compania Caribe, 339 U.S. 684. See, DiBella v. United States, supra at 126.

Nor can it be said that the issues would be better decided in the North Carolina proceeding. Petitioner was not a party to that proceeding; the documents, witnesses and all events relating to the legality of the search and seizure were located in New York. The only possible effect of the decision which might

have affected the trial was that grant of Petitioner's motion could have obviated the need for the entire criminal proceeding, as it was possible the entire proceeding could have been declared a fruit of Fourth Amendment violative conduct. But that determination could have been made pre- or post-trial and it was the trial court which decided to stay its proceedings pending determination of the matter in New York. Nothing at the North Carolina trial was expected to, or did, concern the search and seizure or any facts related thereto; in fact the trial court apparently took pains to exclude from introduction into evidence any reference to the New York investigation. See, DiBella v. United States, supra at 129; wherein the rationale for effectively holding appellate review in abeyance pending outcome of a criminal trial is set forth at length. See In re Fried, 161 F. 2d 453 (2d Cir. 1947), cert. denied, 332 U.S. 807; United States v. Lester, supra; Application of Herr, supra.

The holding of DiBella v. United States, supra, clearly does not sanction or warrant the procedure that has occurred here. The Court held only that "the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability." Rather this case is one wherein the mere circumstance of an indictment was used to preclude appeal of the failure to hold an evidentiary hearing even as to issues of jurisdictional fact which would have shown the within motion to have been a truly independent proceeding. Certainly, the test described in DiBella is in no way applicable here, for there was no criminal prosecution in esse against the movant. The course of the proceedings clearly shows that the persuasive policy pronounced in United States v. Klapholz, 230 F. 2d 494 (2d Cir. 1956) and expressly approved of in DiBella should have counselled in favor of decision on the merits

of the motion and sanctioned appeal of the declination of jurisdiction. Burdeau v. McDowell, supra. This was recognized by the North Carolina court, which the Court below erroneously denominated the trial court (there was no trial court for Petitioner). It stayed its hand, in accordance with the policy of conserving judicial resources set forth in United States v. Lester, supra:

> "this course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of the controversy besides avoiding the risk of determining prematurely and inadequately the admissibility of evidence at the trial. United States v. Lester, supra at 31.

To the extent that any duplication has taken or will take place, that was guaranteed by the District Court's decision, and the Appeals Court's failure to intervene; moreover, due to the impropriety of the North Carolina Court as venue for determination of the legality of the search and seizure, the movant's absence there, the considerations applicable

through the doctrine of forum non conveniens, etc., the dangers of inadequate determination on the questions raised by the motion were decidedly greater in North Carolina than in New York. DiBella v. United States, supra at 132; United States v. Lester, supra. There was no question of a premature determination as the Government had repeatedly represented that the investigation was closed.

Thus, the existence of an ancillary proceeding, unrelated to the original search and seizure, in another district does not cause a Rule 41 motion for return to be "more than a motion for return" for purposes of the DiBella test of appealability. Were that not the case the Government could seize illegally, keep the materials for any length of time and use them against anyone at their executive whim and caprice. The materials herein have yet, in trut and fact, to be returned. And they number min mally one-half million.

This case is surely one wherein denial of

review renders impossible any review whatsoever of an individual's claims. United States v. Ryan, 402 U.S. 530 (1971).

Cobbledick v. United States, 309 U.S. 323 (1940) clearly states the policy of the United States courts that the finality doctrine shall be departed from "when observance of it would practically defeat the right to any review at all." Id, at 324-5. Citing Perlman v. United States, 247 U.S. 7 (1917), the Court held that where "an adjudication becomes sufficiently severed from an ongoing matter, and appeal is permitted." This is espacially true where a ruling of non-reviewability would leave the Petitioner " "powerless to avert the mischief of the order... 247 U.S. at 13." Cobbledick, supra at 328. Explaining the Perlman decision further, the Court noted that "to have denied him opportunity for review on the theory that the District Court's order was interlocutory would have made the doctrine of finality a means of denying

Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." Cobbledick, supra at 329. (Emphasis added). Yet this is precisely the result of the appellate Court's decision -- Petitioner is denied all opportunity for appeal and for hearing.

II. THE RULING OF THE DISTRICT COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF THE JUDICIAL PROCEEDINGS -- AND THE SAME WAS SANCTIONED BY THE COURT OF APPEALS -- AS TO REQUIRE AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The permitting, as has been done here, of general searches unconnected to any planned prosecution, without any particularization of the items sought nor mention of those targeted thereby, is a practice completely unheard of in this country, contrary to all previous precedent, and one which this Court cannot allow to continue unaddressed. As this Court noted in Boyd v. United States, 116 U.S. 616 (1886):

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' since they placed 'the liberty of every man

in the hand of every petty officer' (footnote omitted) This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.'"

"These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the adminsitration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery

> and seizure of books and papers that might be used to convict their owner of the charge of libel."

Initially searches and seizures, even for stolen goods, were considered illegal, and it should be said that even this represented an exception to the general inability of the government of limited powers to conduct a general rummaging through a person's papers and effects. It was for this purposes that the warrant and particularity requirements are mandated through the Fourth Amendment as the minimum of procedural safeguards:

> "The case of searching for stolen goods crept into the law by imperceptable practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and therefore, if the two cases resembled each other more than they do, we have not right, without an act of pariliament , to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon the oath of a theft committed. The owner must swear that the goods are lodged in such a place.

> He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description ... "
>
> "If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper check; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy; my answer is, that all these precautions would have been long since establishe by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing." Boyd v. United States, supra.

Thus a court which permits such practices to go unchecked abandons itself and its subjects to the forces of lawlessness, chaos and anarchy against which there is no protection. For it is settled that,

> "Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret

> nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society. Boyd v. United States, supra. (Emphasis added)

See, Stanford v. Texas, 379 U.S. 476 (1964); Entick v. Carrington, 19 Howells St. Tr. 1029 (1765); Marron v. United States, 275 U.S. 192 (1927); Nathanson v. United States, 290 U.S. 41 (1933).

A matter of further concern was the District Court's actions with regard to the HERMAN AFFIDAVIT which formed the basis of issuance of the "warrants" in this matter. The affidavit was sealed upon order of the District Court, and without notice to any of the persons affected by that action. Petitioner was deprived of access thereto, even for litigation purposes, on grounds of grand jury secrecy, among others. Subsequently,

after an entire year of Petitioner's attempts to obtain adjudication of the questions of quashal and return, the government had the HERMAN AFFIDAVIT unsealed without notice to any of the person affected thereby, and disseminated the same as "public document" even though it had been forced by the results of the search and investigation to abandon the hypothesis contained within the affidavit.

These acts represent a clear deprivation of due process, since Petitioner was not afforded notice and opportunity to be heard, had not been permitted access to the affidavit when it might have aided their case and was materially jeopardized in its hearing on the quashal of the "warrant" unprejudiced and untainted by the placement on the record, of the HERMAN AFFIDAVIT and consideration by the Court thereof at the precise time when motion to quash first became ripe for consideration.

The excuse given for this action was that the HERMAN AFFIDAVIT was needed for a proceeding elsewhere in furtherance of admission into evidence of materials seized in the search and seizure; however, Petitioner had been seeking a determination of the validity of the "warrants" on their faces, which had to had been determined without resort to a perusal of the affidavit, for more than a year, and right to that determination as to Petitioner was completely lost by virtue of the decisions below; while the Reid matter was stayed pending determination of the motion; and keeping the status quo as regards the affidavit would have promoted efficiency and justice and prevented Petitioners from being prejudiced, as the North Carolina court itself recognized. The HERMAN AFFIDAVIT in fact contained no reference to either the Defendant, the charge or the alleged acts which were the subject of the Reid prosecution.

Under these circumstances, the decision below is regarding the HERMAN AFFIDAVIT is easily seen to be arbitrary and capricious, an abuse of discretion and contrary to the policies of this Court regarding sealing materials for the protection of those named during the course of an investigation or inquiry but not indicted or charged. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Petitioner was repeatedly denied access to hearings before the Court and an opportunity to be heard.

The District Court made no showing and requested none, that would support a declination of jurisdiction in the matter. Since no alternative forum existed in which Petitioner could gain hearing, that ruling was clearly erroneous. Radio Station WOW v. Johnson, 326 U.S. 120, 126; See Application of Herr, supra, at 1305; DiBella v. United States, supra, at 125. The Court of Appeals, faced with such an incomplete record devoid of grounds upon which to

decide the jurisdictional question, should have reversed the District Court's decision and remanded the matter for further proceedings. Freedman v. United States, 421 F.2d 1293 (9th Cir., 1970).

III. THERE IS A TRUE AND SIGNIFICANT CONFLICT AMONG THE CIRCUITS AS TO HOW CASES SUCH AS THIS ARE TO BE HANDLED

There is a hopeless jumble of confusion in place of a clear rule of law which exists among the various circuits that prevents the rendering of relief in furtherance of the Fourth Amendment. Rather than the declaring as void or illegal government conduct and proscription of benefit from such misdeeds as a necessary corollary thereof, courts have taken to retreating to equitable discretionary balancing as an exercise of jurisdiction. There is no clear basis for that power; nor are the criteria to be applied at all clear, nor are the extents of the application of such rules at all intelligible. Yet the Fourth Amendment is abundantly clear in its proscription. Rule 41(e) was specifically enacted in furtherance of the application of the Fourth Amendment. Centracchio v.

Garrity, 198 F.2d 382 (1st Cir., 1952), cert. den., 344 U.S. 866. Rule 41(e) specifically couples return of property to a finding that the search and seizure was illegal. It expressly makes a motion to declare so available in the district of seizure. This confusion has been permitted to run rampant because of an inability of appeals courts to play their traditional role in supervision of cases in the district courts by a rigid and blind adherence to the rule attributed to DiBella v. United States, supra, and its progeny. Thus Rule 41(e) has been restricted to a medium for return of materials after legal search and seizure, see United States v. Premises Known as 608 Taylor Ave., etc., 584 F.2d 1297 (3rd Cir., 1978), instead of a means for redressing illegal searches and seizures. See United States v. Taylor, supra, concurring opinion of Judge Rosenn which suggests that there is no jurisdiction under Rule 41(e) where the search

and seizure is admitted to have been lawful in the first instance. As that case shows, it is the Third Circuit rule, even in a case where the search was stipulated to have been legal, that where the determination of the motion will not interfere with any criminal proceedings and where the government has no need for the materials, it must be returned, and the District Court's decision is appealable. See, United States v. United States Currency, etc., 495 F. Supp. 147 (EDNY 1980) ("a district court has both the jurisdiction and the duty to return seized property to a defendant lawfully entitled to possession once the government has no further evidentiary need for it")(Emphasis added). In order to supplement the evisceration of Rule 41(e), courts have relied upon an "anomalous jurisdiction" in a variety of settings.

Petitioner moved to quash the "warrants" and for return of property immediately after

search and seizure, based on patent violations of the Fourth Amendment and those motions were denied on grounds that a grand jury proceeding was alleged by the government to be pending, that Standard Dry Wall, Inc. v. United States, supra, precluded grant of relief, (See also United States v. Glassman, 533 F.2d 252 (5th Cir., 1976)), and that United States v. Imperial Distributors, 617 F.2d 892 (1st Cir., 1980), precluded appeal at that time. But no grand jury proceeding ever existed. Hence, the effect of the DiBella and Standard Dry Wall rulings as applied in the Second Circuit is to preclude Rule 41(e) relief at any time except in as much as Rule 12 may provide relief if the government decides to prosecute, and except that return, without an adjudication as to the illegality of the seizure may be had if the continued retention as opposed to the seizure itself becomes unreasonable. These rules preclude relief and appellate review

precisely in situations where it is most needed and most appropriate. The effect of these decisions is to require Petitioners, who, despite seizure of a great portion of their filed have been charged with no wrongdoing, to show irreparable harm, callous disregard of the Fourth Amendment on the part of the government, and the existence of an adequate remedy at law -- removing the Constitution as the law of the land and substituting for it only equitable jurisdiction.[4] Application of Campola, 543 F. Supp. 115 (NDNY 1982); Puper v. United States., 604 F.2d 1131 (8th Cir., 1979); Hill v. United States, 346 F.2d 175, 178 (9th Cir., 1965), cert. den., 382 U.S. 956 (1965).

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[4] In the instant case, the District Court did not even take evidence as to the appropriateness of exercise of equitable jurisdiction and the substantial harm its clients if it declined to exercise jurisdiction.

The DiBella rule has caused more specific conflicts in this case than the mere theoretical basis of the Court's power to rule and the extent thereof. It has resulted in manifestly inconsistent rulings even within the Second Circuit itself.

Judge Lasker, in November of 1984, when faced with the government's stated willingness to give back materials seized under one warrant herein, exercised jurisdiction and rendered decision, making it clear that such return formally pursuant to Rule 41(e) that none of Petitioners rights or remedies pursuant to Rule 41(e) were to be construed as limited by his decision that the search and seizure in the Southern District of New York was neither legal nor proper; while Judge Nickerson, under similar circumstances, refused to do so. The ruling herein that neither order is applicable by either party effectively guarantees that such a result may follow any search and seizure involving

multiple locations in more than one district. In such a situation the Court of Appeals would not, in accordance with the tenor of the decision below, even have the supervisory power to prevent dramatically opposite results from emanating from different districts in the same case. This threatens the sound administration of justice as well as the credibitlity and dignity of our courts of law. Your Petitioner respectfully submits that such a situation cannot be permitted to continue.

CONCLUSION

Petitioner submits that the decision of the District Court declining to exercise its jurisdiction to hear its Rule 41(e) motion, which the Court of Appeal for the Second Circuit held to be a non-appealable order, dismissing Petitioners appeal, is contrary to this Court's decisions, so far departs from the accepted and usual course of the judicial proceedings as to require exercise of this Court's powers of supervision, and conflicts with decision of other circuits.

WHEREFORE, Petitioner prays that this Court exercise its discretion and grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

DATED: October 15, 1985

Respectfully submitted,

The Law Firm of Daniel
P. Foster, P.C.
145 West 55th Street
Suite 15A
New York, New York 10019

Of Counsel:
KIT CONELLY DECIOUS

APPENDIX

Certification of the United States Court of Appeals for the Second Circuit, Dismissing Appeal

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of July, one-thousand nine hundred and eighty-five.

Present: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal,*
District Judge

IN RE EX PARTE DECIOUS, ET AL.,

IN RE "SEARCH WARRANTS"

- - - - - - - - - - - - -

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

NO. 85-6147, 85-1127

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from order of said District Court be and it hereby is dismissed in accordance with the oral opinion rendered in open court.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

*United States District Judge for the Southern District of New York sitting by designation.

Certification of the United States Court of Appeals for the Second Circuit, Oral Opinion Dismissing Appeal

United States Court of Appeals
For the Second Circuit

BEFORE: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal ,
District Judge
NO: 85-6147, 85-1127

IN RE "SEARCH WARRANTS"

EX PARTE DECIOUS, ET AL.,

- - - - - - - - - - - - - - - -

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

THE COURT: Thank you.

With respect to the latter argued appeal, number 851127, the appeal seeks reversal of Judge Bramwell's Order unsealing an affidavit upon which a search warrant was issued for the premises of the law firm of

of Daniel P. Foster, P.C.

The 1979 Supreme Court case of Nixon versus Warner Communications, Incorporated, 435 U.S. 589, makes it clear that the standard of review in such a case is whether the District Court abused its discretion.

In our view, Judge Bramwell did not abuse his discretion. For this reason, the Order of the District Court is affirmed and it is so ordered.

With respect to the appeal bearing docket number 856147, this appeal seeks vacature and remand of Judge Nickeron's ruling declining to exercise jurisdiction over a Rule 41E motion made by the firm.

The Government represented to Judge Nickerson and the firm that it was willing to return the property seized during the search of the firm's premises.

The firm continues to seek 41E relief, however, and its avowed intent in pressing this appeal is to obtain suprression of the evidence seized during the search, and the

fruits thereof.

It is clear to us that the motion sought more than the mere return of the property. Therefore, under the 1962 Supreme Court case of DaBella (sic) versus United States, 369U.S.121 and its progeny, Judge Nickerson's ruling is not appealable at this time.

The appeal is dismissed and it is so ordered.

Thank you both.

Transcription of Order of July 19, 1985

Decision and Order of the United States District Court for the Eastern District of New York

No. 84 Misc. 149

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Present: Honorable Henry Bramwell
District Judge

EX PARTE DECIOUS, ET AL.

IN RE "SEARCH WARRANTS,"

Pursuant to an order to show cause dated April 5, 1984, Kit Conelly Decious, Esq. requests that this Court issue an order vacating a March 29, 1984 order, which unsealed an affidavit in support of a search warrant executed on the law offices of Daniel Foster and Associates on or about February 17, 1984, and mandating that the affidavit be resealed pending application of the United States Attorney to unseal by motion or application on notice. After careful consideration of the affidavit and memo-

randa of law submitted by Ms. Decious and the applicable case law, the Court is of the opinion that her request must be denied.

Rule 41(g) of the Federal Rules of Criminal Procedure provides that all papers concerning a search warrant shall be filed with the Clerk of the Court. Although the rule does not specifically refer to affidavits, the requirement that "all other papers in connection therewith" shall be filed seems to encompass them. In Re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207 (D.R.I. 1980). Thus, those courts which have considered applications to seal or unseal affidavits have assumed that sealing is an extraordinary action. Id. at 209 (Citation omitted). Indeed, the policy underlying public access to court records is an important one. Id. See also, United States v. Hubbard, 650 F.2d 293, 317-18 (D.C.Cir. 1980).

On the other hand, this Court has inherent power to seal affidavits "as an

incident of [its] constitutional function, to control papers filed with the courts within certain constitutional and other limitations." In re Sealed Affidavit(s) to Search Warrants, 600 F.2d, 1256, 1257 (9th Cir. 1980). The decision to seal is clearly a discretionary matter to be exercised in light of the relevant facts and circumstances of a particular case. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

In this case, the applicant argues that the affidavit in question should remain sealed because it relates to a grand jury matter. In support of her application, Ms. Decious relies on 6(e) of the Federal Rules of Criminal Procedure which prohibits disclosure of "matters occuring before the grand jury." The veil of secrecy, however, covers the grand jury proceedings not the subject matter of the investigation. In Re Search Warrant, supra, 489 F. Supp. at 211. A careful reading of the affidavit

in issue does not indicate that it stems from grand jury proceedings. On the contrary, paragraphs 24 and 25 simply state that grand jury subpoenas duces tecum were served on Ms. Decious and Mr. Foster on February 16, 1984 and that both parties appeared before Judge Nickerson to contest the validity of the subpoenas. This is insufficient to bring the affidavit within the purview of Rule 6(e).

In so finding the Court is cognizant of the fact that the government cited the secrecy of the grand jury proceedings as one of its arguments in support of its original application to seal the affidavit. The Court notes, however, that in granting the original application, it relied primarily on the other two reasons cited by the government which no longer apply. Had the government relied solely on Rule 6(e), its application to seal would likewise have been denied.

For the reasons stated above, application to vacate the March 29, 1985 order and to reseal the affidavit in question is denied in all respects.

SO ORDERED.

Henry Bramwell
U.S.D.J.

Dated: Brooklyn, New York
April 8, 1984

Memorandum and Order of the United States District Court, Eastern District of New York

No. 85 C 1654

UNITED STATES DISTRICT COURT

Eastern District of New York

PRESENT: Honorable Eugene H. Nickerson
District Judge

EX PARTE DECIOUS, et al.

IN RE "SEARCH WARRANTS"

Movants seek an order quashing the warrants executed upon them on or about February 17, 1984 within the Eastern District of New York and directing the return of all property seized thereunder pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The government represents that it intends to return voluntarily all the property seized from this district and that the motion is moot.

Rule 41(e) provides that a "person aggrieved by an unlawful search and seizure

may move the district court for the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized." If the court grants the motion to restore the property, "it shall not be admissible in evidence at any hearing or trial." Id. Rule 41(f) provides that a "motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Rule 41(e) clearly permits the court to entertain this motion for the return of property seized in this district, even though no trial is pending here. However, the rule does not give aggrieved parties the absolute right to have their motions decided in the district of seizure. See Application of Herr, 473 F. Supp. 1304 (S.D.N.Y. 1979); United States v. Lester, 21 F.R.D. 30 (S.D.N.Y. 1957). When the court is not the trial court, it is more

appropriate to exercise jurisdiction under this rule only where declining to do so would cause the moving party irreparable harm. See In re Grand Jury Proceedings, 466 F. Supp. 863, 866 (D.Minn. 1979).

Since the government represents that it will voluntarily return all the property taken from the Eastern District, the movants will not obtain a ruling at this time on whether the property itself, or any "fruits" of that property, would be admissible at a trial. The policy of Rules 41(e) and (f), however, expressly favors that motions to suppress evidence be made in the trial court, so that all pretrial motions can be disposed of in a single court appearance. See 1972 Advisory Committee Notes.

A consideration other than that of judicial economy counsels against the court's ruling on the admissibility of evidence in this action. No indictment has been handed down in this district, no trial is pending here, and the government is

willing to return the property. Declining to exercise jurisdiction will avoid the risk of prematurely and inadequately determining the admissiblity of evidence at a trial, see United States v. Lester, 21 F.R.D. 30 (S.D.N.Y. 1957), and will ensure that such a determination is made only after a proceeding that is properly adversarial.

The court is informed that a criminal trial is pending before the District Court for the Middle District of North Carolina, United States v. Amanda Reid, in which the government might seek to introduce this property or fruits thereof as evidence. If the government intends to do so, it will be most appropriate for the court fully familiar with the litigation to determine whether the evidence is admissible in that action, where the parties are clearly adversaries and the issue is ripe for resolution. Movants' arguments as to why that

court is inappropriate are unpersuasive.

The court exercises its discretion to decline jurisdiction on the condition that the government return movants' property. Nothing in this decision shall be deemed to prejudice or waive any rights the movants have to make a suppression motion in any district court where a trial is pending. So ordered.

Dated: Brooklyn, New York
June 7, 1985

Order of the United States District Court for the Eastern District of New York to Unseal

No. 84 M 149(HB)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Present: Honorable Henry Bramwell
District Judge

IN RE: SEARCH WARRANTS

Upon application of RAYMOND J. DEARIE, United States Attorney for the Eastern District of New York, by John J. Gallagher, Assistant United States Attorney, it is hereby

ORDERED that the Clerk of the Court unseal the Affidavit for Search Warrants which was previously ordered sealed by this Court on or about February 15, 1984.

Dated: Brooklyn, New York
March 29, 1985

SO ORDERED:

Hon. Henry Bramwell

Decision of the United States District Court, Southern District of New York, rendered orally, Denying Relief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESENT: Honorable Morris E. Lasker
District Judge

LAW FIRM OF DANIEL P. FOSTER, P.C.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

November 16, 1984

THE COURT: I am prepared to rule with regard to the Southern District documents, then, that on representation of the government that the documents have been returned which are not in dispute, and that copies have not been made of them and are not being used at least in the Eastern District of New York for law enforcement purposes and sofar (sic) as this United States Attorney,

Mr. Gallagher, knows, for law enforcement purposes anywhere, that the plaintiffs have been granted full relief except for the possibility that in spite of Mr. Gallagher's good faith representations, he may be incorrect, and I state for the record that my denial of further relief is explicitly conditioned on the proposition that the plaintiff not be deemed to have waived any rights which it would otherwise have under Rule 41 B, or any other rights, to move to suppress the use of any such documents or copies of documents unless they are hereafter legally and properly seized for law enforcement purposes. All right?

Order of the Supreme
Court of the United States,
Extending Time

No. A-193

SUPREME COURT OF THE UNITED STATES

Present: Honorable Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17, 1985.

Dated this 11th day of September, 1985

Thurgood Marshall
Associate Justice of
the Supreme Court of
the United States

STATUTES INVOLVED

Federal Rules of Criminal Procedure, Rule 41(e)

Rule 41(e): Motion for Return of Property: A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Rule 41(g): Return of Papers to Clerk:

The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

UNITED STATES STATUTES

28 U.S.C. Section 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.